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ABSTRACT

This pamphlet provides information necessary to analyze existing grievance procedures and sets forth principles to guide the formulation of a more effective grievance process. The introduction defines the grievance procedure in a contractual contest, describes its benefits to management, union members, and private citizens; and briefly reviews key problems. The second chapter discusses the historical and legislative development of grievance arbitration, while chapter 3 discusses the differences in arbitration between the public and private sector. The fourth chapter is a guide to negotiating the language of grievance procedures. The discussion illustrates the significance of the following characteristics: definition, eligible grievant, steps in the grievance procedure, time limits, final step, no reprisal clause, source of arbitrator, limitations on arbitrators' authority, and conditions of arbitration. The fifth chapter discusses potential reforms, specifically expedited grievance arbitration procedures, and grievance mediation. A brief conclusion follows, along with footnotes. (TE)

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Grievance Arbitration in Education

Ned B. Lovell

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Grievance Arbitration in Education

by
Ned B. Lovell

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Introduction

Today, few school teachers and professors meekly accept all decisions of their principal, superintendent, or college president. And it is not only the militant, disgruntled teachers who file grievances. The enlightened self-interest of *any* teacher may require the filing of a grievance.

Teachers and professors use grievance procedures when they disagree with administrative decisions. A grievance procedure provides a rational, peaceful way to resolve differences of opinion concerning negotiated contracts. Given human nature and the fact that teachers and administrators often have different objectives, professional training, and work requirements, disputes are inevitable. Administrative decisions such as teacher evaluation, class size, personal leave, teaching assignments, and extracurricular duties directly affect the lives of faculty and often generate conflict. Unfortunately, "little has been written about the principles that might guide the formulation of effective grievance procedures."[1] The purpose of this fastback is to provide the reader with information needed to analyze an existing grievance procedure and to formulate more effective procedures.

Whether educators are comfortable with the concept or not, the grievance process is here to stay. It has become the primary method of resolving contractual disputes between faculty and school management. Therefore all parties – faculty members, administrators, and policy makers – need to understand the grievance process and how to maximize its potential benefits.

Unionized employees generally insist that a grievance procedure be included in their contract. Faculty employees, like their counterparts in the private sector, recognize that the grievance procedure is necessary to

enforce management compliance with the terms and conditions of employment specified in the contract. Most grievances are generated by 1) outright violation of the contract by school management, 2) disagreement over the meaning of contract language, 3) disagreement about the way the contract is implemented, or 4) dispute over the fairness or reasonableness of management actions. Such disagreements are not uncommon in any organization, and it would be naive to think that schools and colleges are somehow different.

The grievance procedure establishes the means for resolving disputes arising from the interpretation or application of the terms of the contract. A contract is of little value for teachers without a grievance procedure. Consequently, the grievance procedure, especially if it includes arbitration as the final step, is the most important clause in the contract and is viewed as one of the most significant contributions of the American labor movement.

There are three major methods for resolving contractual disputes in American labor relations: self-help, litigation, and arbitration. Self-help is a labor term meaning either a strike by employees or a lockout by management. Self-help is highly disruptive, and teacher strikes are illegal in all but five states.

The second method of resolving contractual disputes is litigation, and the courts in all 50 states have the power to enforce labor contracts. In some states legislation allows school boards to ignore requests for arbitration. Experience with litigation has led many boards and unions to conclude that the judicial process is too costly, too expensive, too legalistic, and not really designed to solve problems in the school working environment. However, litigation is the only method available in some states for resolving contract disputes.

The third method is grievance arbitration. Arbitration makes self-help unnecessary during the life of a contract and avoids much of the costs, time, and anxiety of litigation. Grievance arbitration is present in virtually all private sector contracts and is growing in popularity in education in spite of strong opposition by many school boards and college trustees.[2]

In everyday language the term grievance is synonymous with complaint — anything that bothers anyone. In labor relations, the definition

is negotiated in each contract. Management attempts to define the term narrowly and to restrict the grievance process to misinterpretations and misapplications of the negotiated agreement. The union prefers a much broader definition so that employees may grieve anything that affects wages and working conditions. Many current contracts have adopted a compromise position between these two extremes.

Arbitration is a third-party settlement of disputes between individuals or parties outside a court of law. Labor arbitration most commonly is used to settle disputes between parties of a labor agreement as to its application or interpretation. Since such arbitration consists of determining the *rights* of a party to an agreement, it is referred to as a "rights dispute" or, more commonly, as "grievance arbitration."

Each institution and its employee association negotiate their own grievance procedure. While there is variability in the language of contract clauses, there is much commonality in the fundamental features of a grievance procedure. Features generally specified include the following:

- What is the definition of a grievance?
- Who may initiate a grievance?
- How long does the grievant have to decide whether or not to file a grievance?
- What is the union's role in the process?
- Where should the grievance be filed?
- What are the procedural steps to follow?
- What are the timelines and deadlines?
- What is the final step?

Most administrators and union leaders encourage an informal conference prior to the filing of the formal written grievance. The purpose of this provision is to encourage both parties to resolve the problem, whatever it is, before their positions become solidified. If informal resolution fails, the grievant has access to a number of appeal levels, called steps, which generally follow the organizational chain of command. Most grievance procedures have three to five steps. Binding arbitration is often the final step. Binding arbitration allows an impartial third party to make a final decision about the dispute.

Arbitration has not been accepted by all education institutions. Many contracts stipulate that the final step is a hearing before the board of education or board of trustees. Unions prefer arbitration while boards generally prefer that control and flexibility be retained by them. Nevertheless, binding arbitration of grievances is becoming more common each year in education institutions and is mandated or permitted by law in at least 20 states.[1]

Benefits

The grievance process benefits management, union members, and private citizens. Any contract can become the focus of a dispute. Ideally, the grievance process provides a quick and inexpensive resolution of contractual disputes. Employees are given an opportunity to protest management decisions without fear of retribution and do so with the assistance of a union advocate.

Management benefits from grievance procedures because the process provides a systematic channel for resolving differences. The process serves as a safety valve for the employee and allows the administration to identify and isolate problems. When the alternatives of strikes, physical intimidation, and a multitude of other disruptive tactics are considered, the benefits are obvious to administrators and board members. In addition, the procedure encourages employees to resolve problems at the lowest possible level and to appeal progressively up the chain of command.

Both parties to the labor contract have a vested interest in enforcing compliance of the terms and conditions of the contract. Management has various discipline measures to ensure that employees honor the terms of the contract. The union must rely on the grievance procedure to enforce the contract. When a teacher believes that the administration is improperly administering the contract, the teacher can file a formal written grievance. This process prevents management from ignoring the contract and establishes a process to settle the differences of opinion peacefully.

Management decisions are carefully monitored by the faculty union. The union will encourage and support individual faculty members who wish to use the grievance procedure to challenge management decisions.

The union must enforce the contract or it will have little value and the union will have no power. Grievances also provide a vehicle for the union to react to management decisions and to protect the rights of employees.

The grievance procedure is most useful to the union if the final step is binding arbitration. Arbitrators expect and enforce consistent and uniform administration of the contract. Consequently, management must implement and administer the contract carefully.

The public also benefits from the grievance process because faculty grievances are settled without disruption to the school schedule. Strikes, pickets, slowdowns, and other disruptive practices are not needed because employees accept the grievance procedure as a legitimate method of resolving differences. Consequently, disruption of the school calendar and the daily schedule of parents and students is greatly minimized.

Current Problems

While the benefits of grievance procedures are substantial, critics have identified several key problems. The grievance process has become costly, time consuming, and legalistic; and it often fails to meet the needs of individual employees. This is especially true when binding arbitration is the final step. Because the quasi-legal process often involves lawyers and transcripts, a single arbitration may cost a union several thousand dollars; and a small union may not have the funds to arbitrate many legitimate grievances.[4] When legitimate grievances are not taken to arbitration because of cost consideration, both the arbitration process and the union lose credibility. In a recent study of school employee grievances, Brodie and Williams found that the average grievance required 9 to 12 months for final resolution.[5] Lawyers, transcripts, witnesses, pre- and post-hearing briefs, and long delays often make the arbitration process so cumbersome that it discourages justice and problem resolution.

An additional problem is that many arbitrators are not familiar with public education. An uninformed arbitrator may render awkward settlements that are not desired by either party. On occasion, arbitrators award benefits to an individual employee that exceed those statutorily

granted to all employees. This not only places the employer in violation of state law but upsets the union, which seeks uniform benefits for all employees.

A final problem is that school and college governing boards increasingly have refused to consider arbitration awards final and binding. This is especially true when arbitrators ignore the non-delegable powers enumerated in state statutes and where awards conflict with state statute. Many institutions have appealed arbitration awards in the courts successfully. Unions also appeal arbitration awards. Union challenges have been based on charges that arbitrators exceeded their authority or misunderstood the contract. While often a necessary step, this resort to judicial review further diminishes the value of the grievance process by making it even more costly, time consuming, and legalistic.

These problems have generated concern about the grievance process. The language of grievance articles is being carefully studied by school management and faculty unions. Both parties need guidelines to assist them in the negotiation of grievance procedures. If educators understand the grievance arbitration process, take steps to avoid grievances, and attempt to resolve differences when they arise, the money, time, and energy expended on grievances often can be reduced.

The Development of Grievance Arbitration

Formal grievance procedures and grievance arbitration were developed first in the private sector in order to keep factories working. Because many of the basic principles and traditions regarding grievances now have become part of education labor relations, it is useful to understand how grievance procedures and grievance arbitration developed. Furthermore, state labor boards and arbitrators often rely on legal precedents and guidelines established in private sector court cases.

In the early days of the American labor movement, employees resorted to strikes, violence, and other job actions to force the resolution of disputes. These job actions were highly disruptive and had a negative impact on the employer, the employee, and the general public. By 1900 both labor and management began to make a distinction between negotiated disputes and disputes about management's interpretation and application of the contract. This distinction led to the development of different processes to resolve the two types of disputes. Responsible managers and labor leaders recognized that a strike or lockout might be required to get a contract settlement but that such a show of strength to resolve disputes was redundant and wasteful.

One of the earliest known grievance procedures was contained in a national agreement in the stove industry in 1891.[6] Gradually, grievance procedures came to be a common practice during the first decade of this century. The grievance procedure was a great advance, allowing most contractual disputes to be resolved without interrupting work. The process of grievances working their way through progressively higher steps in the organization often brought sound decisions that were

accepted by all parties. Yet these grievance procedures left all decision-making power in the hands of management. Management could interpret the contract to suit its own needs and ignore the union's interpretation. If the union was not satisfied with the final decision handed down by management, it was almost forced to strike.

Legislation Concerning Arbitration

While grievance arbitration was practiced as early as 1902, it did not become a common practice until much later.[7] Less than 10% of the labor agreements in the early 1930s provided for grievance arbitration.[8] Fearing control by a third party, both management and organized labor resisted arbitration. As late as 1938 the American Federation of Labor denounced arbitration as an "absolute violation of constitutional rights of American workers."[9]

The Railway Labor Act adopted by Congress in 1926 specified that all railroad contracts had to "provide for prompt settlement of disputes and grievances." The Act also provided that grievances would be resolved by an adjustment board established by the parties. Decisions of this board were to be final and binding.

Because this process did not always work, Congress amended the Act in 1934 and established a National Railroad Adjustment Board, which appointed neutral individuals to hear and resolve grievance disputes. Congress provided these arbitrators with final and binding authority except for financial awards. The Act further provided that the courts could force both parties to comply with the award made by the arbitrator.

The next major step in the evolution of grievance arbitration was the passage of the National Labor Relations Act of 1935. While the act itself was silent concerning the problem of enforcing collective bargaining agreements, it made the need for such a procedure highly visible.

During World War II, Congress established the War Labor Board to maximize the war effort. The board was empowered to settle disputes and required that contracts include grievance arbitration. The War Labor Board expired in 1945, but the arbitration that the board had required caused both management and labor to recognize that arbitration was highly desirable. In 1945 the President's Labor-Management Con-

ference, convened by President Truman, unanimously recommended that all labor contracts "specify a complete procedure for settlement of grievances, including arbitration."[10] The Taft-Hartley Act of 1947 made grievance arbitration a cornerstone of national labor policy. Section 203(d) provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising out of the application or interpretation of an existing collective bargaining agreement." While Congress preferred arbitration, the drafters of the Taft-Hartley Act provided an odious alternative. Section 301 states, "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties." This stipulation caused most employers and unions to adopt grievance and arbitration clauses in their contracts to shield themselves from such litigation. Today, virtually all agreements in the private sector contain grievance arbitration clauses.

Tradition and legislation did much to spread the use of grievance arbitration, but the U.S. Supreme Court must be given credit for enhancing the status of grievance arbitration. In *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, the Court established the principle that arbitration awards shall be enforced by the courts. The Court noted that the decision "expresses a federal policy that federal courts should enforce these agreements . . . and that industrial peace can be best obtained only in that way."

The Court also noted that the enforcement of arbitration was granted with conditions attached. In the court's view, the agreement to arbitrate grievance disputes was given in exchange for an agreement not to strike during the life of a contract.

The agreement not to strike is a unique American invention only slowly being accepted around the world. The lack of such a tradition is one reason why workers in some European countries always seem to be on strike. When adequate procedures have not been developed to resolve disputes with employees, any grievance has the potential to erupt into a strike.

Lincoln Mills caused many thoughtful observers to fear that the federal courts would use their new enforcement power to interfere un-

duly with the union-employer relationship. In the summer of 1960, the Supreme Court clearly specified the role of the courts in three decisions known as the "Steelworkers Trilogy," which spelled out five key labor law principles. The three cases that constitute the "Steelworkers Trilogy" and the principles they established are:

United Steelworkers v. *American Mfg. Co.*

1. Courts should rule on questions concerning whether or not a dispute can be arbitrated, but not on the merits of the case.
2. Doubts about arbitrability should be decided in favor of sending the case to arbitration.

The Court also held that if the agreement provides for arbitration of all disputes concerning the interpretation and application of the contract, then all claims are arbitrable, even if they appear frivolous.

United Steelworkers v. *Warrior Gulf and Navigation Company*

3. Disputes over contract terms are assumed to be arbitrable unless arbitration is specifically excluded.
4. Arbitration is substituted for the right to strike during the term of the contract.

Clearly the Court was supporting federal policy to promote industrial stabilization through the collective bargaining agreement.

United Steel Workers v. *Enterprise Wheel and Car Corporation*

5. Courts should not review the substantive merits of an arbitrator's decision unless the arbitrator's award ignores the content of the agreement.

The Supreme Court concluded that courts, as a general practice, should refuse to review the merits of an arbitration award. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merit of the awards. The opinion stated, "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." Because of these "Trilogy" principles, judical intervention in arbitrations is rare in the private sector.

The Supreme Court in these decisions placed a great deal of faith in the grievance arbitration process. Three judicial goals provide the ra-

tionale. First, the Court wanted to minimize industrial strife and therefore established arbitration as an exchange for no strikes during the life of a labor contract. Second, they wanted to prevent the court system from being overloaded with labor disputes. Third, they wanted an alternative to the court system that would encourage justice but also would be inexpensive, relatively quick, and responsive to the practical realities of a particular dispute. The Supreme Court assumed that arbitrators have a better understanding of the work place than do judges and therefore would render more logical and pragmatic awards.

In spite of the overwhelming judicial and legislative preference for grievance arbitration, approximately 4% of negotiated agreements in the private sector and many public sector contracts do not provide grievance arbitration. Without such provision, grievances are settled in one of three ways: 1) a lawsuit may be brought in either federal or state court and the judge will interpret the agreement, 2) some contracts provide management with the authority to resolve grievances, and 3) some agreements provide that the union may strike if management rejects a grievance. However, most contracts contain provisions for grievance arbitration because of the speed, economy, and informality associated with arbitration.

Federal legislation and the "Steelworkers Trilogy" have led to judicial recognition and respect for grievance arbitration. In the private sector the court's role is now limited to 1) deciding on requests for stay of arbitration, 2) enforcement of arbitration agreements, or 3) enforcement of arbitration awards. The need for judicial intervention is relatively rare in the private sector; and the courts generally enforce arbitration awards unless there is verified fraud, misconduct, gross error, substantial breach of common law rule, or capricious conduct by the arbitrator. However, this same level of judicial endorsement of arbitration is not present in the public sector.[11]

Arbitration in Public Education

A much different and confusing situation exists in public education than is found in the private sector. All states have numerous laws and regulations covering personnel and working conditions. Hiring requirements, dismissal procedures, minimum number of workdays, length of school day, amount of sick leave, and a host of other matters relating to the working conditions of school employees are prescribed in state statute, at least at a minimum level. School boards and university trustees have supplemented these laws with detailed local personnel policies.

The American system of state responsibility and local control of education has led to a variety of responses to union requests for binding grievance arbitration. There are four basic approaches to public sector grievance arbitration: 1) some states have statutes that are silent on the subject; 2) some states require that all contracts provide binding grievance arbitration; 3) some states have passed permissive legislation; 4) some states do not yet allow public sector employees to engage in collective bargaining, which precludes grievance arbitration.

These differences help explain the diverse court rulings about the role of arbitration in public education. Six questions that frequently have been addressed by the courts are: 1) Does a school board have the authority to accept binding arbitration in the absence of legislative mandate or permissive legislation? 2) Are certain issues such as tenure beyond the scope of arbitration? 3) How should conflicts between faculty agreement and state statute be reconciled? 4) May school boards refuse to arbitrate a legitimate grievance? 5) Can a governing board be

required to honor an arbitration award? and 6) Will the courts enforce an arbitration award that ignores the non-delegable powers of local boards? These questions differ from those that surround the status of private sector arbitration. The judicial response to these questions will vary depending on state legislation; the same legal questions will receive different answers in a state where arbitration is forbidden than in one where it is required.

In spite of this confusion, several general trends are beginning to emerge. Except for those states that do not allow faculty to bargain, arbitration has generally been accepted as a valid method of resolving contractual disputes.

In the early 1960s, the courts generally disapproved of public sector arbitration because they viewed it as an unlawful delegation of governmental power. After many states passed labor laws supporting bargaining, many courts shifted their view to favor grievance arbitration as the desired method of resolving contractual disputes. Most courts now support arbitration – even in states that have not provided express statutory authority for arbitration.

This trend was clearly expressed as early as 1967 by the Wisconsin Supreme Court in *AFSCME* v. *City of Rhinelander*. The city of Rhinelander opposed arbitration of grievances based on the arguments of sovereignty and local control of education. The state statute authorized collective bargaining but was silent on the subject of grievance arbitration. The court ruled that state authorization of collective bargaining implied grievance arbitration.[12] The New York Court of Appeals, responding to the same question, ruled that state legislative authorization for union representation of employees in grievances implies the legitimacy of arbitration and stated that "arbitration is . . . part and parcel of the administration of grievances."[13]

In 1977, the Wisconsin Supreme Court publicly stated its endorsement of the Steelworkers Trilogy:

> When the court determines arbitrability it must exercise great caution. The court has no business weighing the merits of the grievance. It is the arbitrator's decision for which the parties bargain . . . this court (has) adopted the Steelworkers Trilogy teaching of the court's limited function.[14]

Both the Minnesota and Connecticut courts also have endorsed the presumption of arbitration in public sector cases.

As these examples indicate, the courts in most states have generally followed the private sector practice of according substantial deference to arbitration. Based on this legal tradition, the courts will overturn only those awards where arbitrators clearly have exceeded their contractual authority, been guilty of some form of misconduct, or issued decisions that contravene law or public policy. Furthermore, doubts regarding the correctness of an award are usually resolved in favor of enforcement.

This presumption in favor of arbitration is not shared by all legal scholars nor all court jurisdictions. New Jersey courts, with a different statutory background, have been more conservative in their endorsement of arbitration. The court noted in *Township of West Windsor* v. *PERC* that while the bargaining statute requires mandatory grievance procedures, it does not obligate grievance arbitration for all matters. This is hardly a presumption of arbitration.[15]

In the *Liverpool* case the New York Court of Appeals stated that arbitration in the public sector lacked the history and universal acceptance found in the private sector and it would be a mistake to conclude that the presumption of arbitrability applied equally to both sectors.[16] The court further concluded that only those items clearly specified as arbitrable in the contract could be resolved by an arbitrator. This case was viewed by many as a step to protect the discretionary power of governing boards by greatly reducing the issues that had to be arbitrated.

In spite of *Liverpool*, most state courts have generally accepted the "Trilogy" principles concerning arbitrability in the public sector. Even the New York Court of Appeals has ignored its own principle of "reverse presumption" on several occasions since *Liverpool* and has ordered arbitration where it has been implied in the contract negotiated by teachers or other employees.

Differences Between Public and Private Sector Arbitrability

The courts have made exceptions about the presumption in favor of arbitration in public education and have vacated awards where the nondelegable powers of governing boards are involved or where the award is clearly against the law. In 1979 Cook County Community College ap-

pealed an arbitration award that gave striking teachers preferential treatment over non-striking teachers in the assignment of extra work. The court vacated the award because it contravened laws that made the strike illegal in Illinois[17]

Another major difference between arbitrability in the private and public sector concerns the non-delegable powers of school boards and college governing boards. Non-delegable powers include the board's responsibility to hire, fire, and promote employees; to establish the curriculum; and to set standards of service. Courts are reluctant to delegate authority to an arbitrator that has been granted to the governing board by statute.

The *Board of Education* v. *Rockford Education Association* illustrates the rationale for rejecting arbitration.[18] The education association wished to arbitrate a grievance over the failure to promote a local teacher to an administrative position. The court reasoned that this type of dispute is not arbitrable because the school board cannot delegate to an arbitrator or any third party those matters statutorily assigned to school boards.

New Jersey courts often have supported the non-delegable power of governing boards because the state bargaining law explicitly states that collective bargaining must not "annul or modify any statute or statutes." The law also protects the supervisory responsibilities of governing boards. New Jersey courts have declared that the consolidation of chairmanships is not arbitrable because such decisions are a matter of education policy and an exclusive management prerogative of the local board. They also have ruled that the establishment of a college calendar is the exclusive responsibility of the governing board.

Illinois courts consistently have ruled in favor of supporting non-delegable powers over the presumption of arbitration. An Illinois court overruled an arbitrator's award that granted re-employment and tenure to eight community college teachers who had been dismissed. The court stated, "The Board's duties in appointing teachers are non-delegable, and . . . the arbitrator is without authority to award an employment contract as a remedy for the violation of a collective bargaining agreement.[19]

Governmental agencies, including schools and colleges, generally are

considered to have broader discretion to control the employment relationship than private employers. This has led to numerous statutes that provide boards and trustees with considerable discretionary power that is non-delegable and therefore not subject to arbitration. Issues that various courts have declared to be non-arbitrable include tenure decisions, evaluation procedures, consolidation of department chairmanships, and discharge and due process rights of probationary teachers.

The variability of public law has led to different interpretations in different states. At least four states have allowed arbitration of tenure decisions and one state has allowed arbitration over the dismissal of a probationary teacher. The Massachusetts high court also allowed arbitration over the number of substitutes to be hired to maintain a limitation on class size and teaching load that had been included in a contract.[20] While the general support of arbitration is apparent, many courts are concerned about the intervention of arbitrators in the non-delegable powers of school boards.

Most arbitrators have been trained in the private sector. When they are unaware of the intricacies of education law, they often inadvertently infringe on the non-delegable powers of governing boards. Governing boards have learned that they may successfully challenge such awards.

One Midwestern community college frequently seeks judicial reversal of arbitration awards based on the premise that the issues are non-delegable. Over the past five years the college has sought judicial reversal nine times and succeeded in seven cases.[21]

Unions also may challenge arbitration awards. Successful appeals by unions generally are based on the argument that arbitrators exceeded their authority as defined in the labor agreement. Arbitrators also may exceed their authority when the award specifies action by the school board that is the statutory responsibility of another governmental agency or official.

While it may be comforting to know that unions and schools may successfully challenge awards, this fact is also a source of discomfort for those who support the grievance process as an alternative to litigation. Court appeals greatly increase the cost and time involved and minimize the efficacy of a process that is meant to be quick, inexpensive, and final.

The issues that are important to teachers often are thought to be

different from those that concern employees in the private sector. However, a recent study of 840 awards from the files of the American Arbitration Association refutes this assumption.[22] Brodie and Williams did find a lower incidence of discrimination disputes but concluded that grievances of teachers generally are similar to those of employees in the private sector. The most common disputes appealed to arbitration by faculty unions involve leaves, extra duty, assignment, transfer, evaluation, and budgetary disputes.

One reason for the low incidence of discrimination cases arbitrated by teachers is that they often seek remedies in other forums. Forums available to resolve teacher complaints of race or sex discrimination include state fair employment practice commissions, the Equal Employment Opportunity Commission and other federal agencies, and the courts. In *Alexander* v. *Gardner-Denver* the U.S. Supreme Court ruled that discrimination disputes are of such significance that grievants are entitled to seek remedies in multiple forums under the Civil Rights Act. The Court further ruled that an employee who is dissatisfied with the arbitrator's award in a discrimination grievance may obtain a new hearing in the courts because the employee is not seeking a "review of the arbitrator's decision . . . but asserting a statutory right independent of the arbitration process." Because arbitrators can only interpret the contract, which may be silent on race and sex issues, many minority members and females have both sought relief in other forums and obtained a new hearing in court.

The issues and concerns discussed in this chapter trouble legal scholars, but the trend toward grievance arbitration in the public sector continues. Court rulings have supported the process, even though some courts have limited the scope of arbitration so as not to subvert the nondelegable powers of governing boards.

Negotiating the Language of Grievance Procedures

To avoid confusion and later misunderstanding, the language of the grievance procedure should be negotiated carefully. Although labor contracts are negotiated separately and are tailored to local conditions, nine characteristics are common to most grievance procedures. The following discussion will illustrate the significance of each characteristic with special attention to its wording.

Definition

The exact definition of the term "grievance" determines the subject matter that can be grieved and thus minimizes or maximizes the potential number of grievances that may be generated. Contracts contain a great variety of definitions but they usually can be categorized into three types.

A broad definition allows an employee to grieve almost any concern, including issues that go beyond the labor contract itself, such as school or college policies and practices, state laws, and regulations. The broad definition is favored by many teachers and unions since it allows the grievance procedure to serve as a "relief valve" for all types of employee dissatisfaction. Those who favor the broad definition tend to view the contract as merely a general outline of the relationship between the parties, with the grievance procedure used for refining and interpreting the contract. An example of a broadly defined grievance procedure is: "A

grievance is any dispute between an employee and the college administration or board."

The number of issues that can be grieved and arbitrated with this type of definition is infinite. This is not only costly and time consuming but also allows the union, on occasion, to win a favorable arbitration award on issues never brought to the bargaining table when the contract was being negotiated.

A narrow definition limits the grievance process to specific items enumerated within the contract and thus minimizes the potential number of grievances, consequently reducing the potential impact of arbitration. An example of a narrowly defined grievance procedure is: "A grievance is an alleged violation of a specific provision of the contract that adversely affects an employee covered by this contract."

Management negotiators prefer a narrow definition because it prevents the misuse of the grievance procedure and greatly reduces the number of issues that may be arbitrated. The assumption is that the grievance process is not designed to solve every problem or to change school policies but rather to resolve differences over the interpretation or application of the negotiated contract.

Many contracts contain a compromise definition. The compromise definition allows employees to grieve contractual disputes and disputes of other specified policies or procedures. Such a provision allows more grievances than the narrow definition, but it is not as subject to abuse as the broad definition. A typical compromise definition is: "A grievance shall mean any alleged violation, misinterpretation, or inequitable application of the existing agreement, board policies, procedures, or regulation."

Another form of compromise, called the "two-headed" grievance procedure, is one that provides a broad definition of grievance but specifically excludes some issues from arbitration. Such a compromise allows more grievances than the narrow definition but attempts to restrict the intrusion of an arbitrator into areas of managerial discretion.

A recent study of community college faculty contracts in a Midwestern state found that 60% had a narrow definition, 15% had a compromise definition, and 25% had a broad definition. In addition, one

contract did not define grievance, and another contract had no grievance procedure at all.[23]

Eligible Grievant

The Taft-Hartley Act stipulates that employees or groups of employees may file grievances and that the union serves as their representative. In faculty contracts there are four possible categories of eligible grievants: 1) employee, 2) group of employees, 3) union, and 4) employer.

Almost all faculty contracts with a grievance procedure allow the individual employee to submit a grievance. Some contracts also allow a group of employees to collectively grieve when they share similar or identical concerns. Management often resists group or class grievances, arguing that the grievance procedure primarily is designed to protect individual employees from misinterpretation and misapplication of the contract. Other schools have found that group grievances save both time and money and promote harmony among the parties.

Some contracts permit union grievances. Limitations are often placed on the type of grievances that a union may generate on its own initiative. For example, some contracts specify that union grievances are limited to alleged violations of the agreement that are directly related to union rights.

If no limitations are placed on union grievances, the union gains an advantage. The union may use the grievance procedure to focus attention on issues it was unable to obtain at the bargaining table. This can make the grievance procedure a political tool rather than a means to resolve the disputes of individual faculty members.

Although extremely rare in contracts negotiated outside of education, some school and college contracts allow administrators to bring a grievance against the union. Such a provision may have cathartic value, but it has little utility.

Steps in the Grievance Procedure

Informal Step. Many contracts encourage an informal conference between the employee and the supervisor before a formal grievance is filed. The purpose of this provision is to encourage both parties to

resolve the problem before their positions become solidified. This is generally an implied step even when not formally stated in the contract. Responsible labor and management representatives generally encourage informal resolution. If informal consultation fails to resolve the dispute, the employee has the right to initiate a formal grievance.

Number of Steps. The grievance process consists of a number of appeal levels or steps that progress upward through the chain of command. The number of steps varies from contract to contract. The typical grievance procedure has three, four, or five steps. When binding arbitration of grievances is included in the contract, it is always the last step of the grievance procedure.

The value of multiple steps is that they provide both parties with several opportunities to reconsider their positions and resolve the disagreement. The appeals process subjects the grievance to scrutiny from successively broader perspectives and enables both management and the union to withdraw diplomatically from a losing situation and avoid the expense, effort, and potential penalties of arbitration.

Time Limits

Generally grievance procedures contain specified time limits after which a grievance cannot be initiated. This is called a "time bar." Both labor and management recognize the need for a time bar because it encourages prompt resolution, and it helps to ensure that evidence and memory is intact for a reasonable hearing. This article from the Cook County Community College contract is illustrative:

> A faculty member may present a grievance concerning himself, or a grievance may be presented in his behalf, not later than ten (10) school days following his knowledge of the act, event or the commencement of the condition which is the basis of the complaint.

If the contract does not specify a time bar, grievances may be filed months and years after the alleged violation of the contract. When no time bar exists, arbitrators have been willing to hear grievances on their merits regardless of their age. This fact alone should convince administrators and board members of the need for a precise time bar.

Most contracts also specify time limits between the various steps.

Realistic time limits keep the process moving forward from step to step without undue delay by specifying the time by which management has to respond and the time the grievant has to appeal to the next step. Obviously, the pressure to keep the process moving is of advantage to the employee. Management also benefits because evidence and witnesses have a way of disappearing over a long period of time.

Final Step

In the public sector, the final step of the procedure is the most controversial aspect of the grievance process. This step may include advisory arbitration, binding arbitration, or resolution by the governing board.

Advisory arbitration is a misnomer because it does not compel a solution. The arbitrator studies the facts and makes a recommendation to the board. The board makes the final decision, and it may accept or reject the arbitrator's opinion. The presumed expertise and objectivity of the arbitrator is thought to give a strong aura of legitimacy and moral persuasiveness to the board's decision. Advisory arbitration is uncommon in the private sector but relatively frequent in the public sector. Boards often prefer advisory arbitration because they maintain the right to make the final decision yet have the benefit of objective, expert opinion.

Binding arbitration increasingly is becoming the final step in education grievances, in spite of continuing resistance by many boards and administrators. Local boards and college trustees are reluctant to give away their discretionary authority unless arbitration is mandated by law. The trend in state legislation is favorable toward binding arbitration. Public sector unions vigorously pursue binding arbitration as a means of enforcing the contract.

The alternative most favored by many board members, especially in the first few years of a bargaining relationship, is to have the governing board itself serve as the final step. Some boards and some communities are unalterably opposed to the intervention of arbitrators in local decisions. Most union leaders believe that board control of the grievance resolution process is contrary to the spirit of negotiations and destroys the value of the master agreement.

No Reprisal Clause

Many contracts attempt to ensure protection of employees by firmly stating that no reprisals will be made against employees who initiate grievances or participate as a witness. Faculty often fear dismissal, punitive damages, and other arbitrary and capricious actions by administrators in retaliation for their participation in a grievance hearing or arbitration. Consequently, a No Reprisal Clause is common in most grievance procedures.

Source of Arbitrator

The sources of arbitrators include the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), state agencies, and private citizens.

Both the AAA and the FMCS provide rosters of qualified arbitrators on request. The AAA sends both parties a list of nine arbitrators. Management and the union generally strike (remove) arbitrators that are not acceptable to them from the list on an alternating basis. The union usually has the first strike and management the last. The last name remaining becomes the arbitrator.

When both parties are unable to agree on an arbitrator, the AAA will provide additional lists. Some contracts authorize the AAA to make an appointment when agreement cannot be reached. The FMCS follows similar practices. Both organizations allow arbitrators to set their own fee, which usually is shared equally by both parties.

Occasionally, if both parties agree, private citizens are selected as arbitrators. This practice is not common today because arbitration can quickly become technical and often is beyond the grasp of inexperienced people, however sincere.

Limitations on Arbitrators' Authority

Contracts with binding grievance arbitration generally place some limitations on the arbitrator's authority. This is done to clarify the arbitrator's responsibility and to prevent non-arbitrable items from being arbitrated.

Arbitrators have only the authority that the parties delegate to them in the agreement. Therefore, the contract should specifically state the extent of the arbitrator's authority as well as the rights of the employer, the union, and the individual employee. Any restriction of the arbitrator's authority must be specifically stated. For example, "the arbitrator shall have no power to add to, subtract from, or modify the items of this agreement."

Some agreements limit arbitration to the interpretation of certain specific clauses. For example, "only questions of discipline may be arbitrated." Such a limitation greatly reduces the issues that are arbitrable.

Arbitrators are ethically bound and legally required to exercise only the authority provided them in the agreement. If no parameters are stated, both parties may have to live with the arbitrators' interpretations of their authority. Language from the 1982-84 Cook County Community College contract attempts to ensure a limitation on the arbitrator's authority:

> The arbitrator shall limit his decision strictly to the application and interpretation of the provisions of this Agreement and he shall be without power or authority to make any decision:
>
> 1) Contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement; or
>
> 2) Limiting or interfering in any way with the powers, duties, and responsibilities of the Board under applicable law.

Conditions of Arbitration

Contracts often contain an article that specifies the rules, procedures, and obligations of the respective parties, such as access to arbitration, type of arbitration used, and the payment of expenses. Incomplete or ambiguous provisions can cause each arbitration to become the source of misunderstanding between the parties and can even generate additional grievances and litigation.

Arbitration is a quasi-legal system. This system works best when both parties know the rules and procedures in advance. Conditions often enumerated in contracts include: 1) rules to be used, 2) time limits until the hearing is held, 3) use of a court reporter, 4) post-hearing briefs, 5) time limits on arbitrator decision making, and 6) payment of

arbitration fees and expenses. In addition, there is often a requirement in the contract that both parties must fully and immediately accept the decision of the arbitrator. Some contracts also state that neither party will appeal the award to the courts unless one of the parties believes that the arbitrator acted illegally.

Access to Arbitration. The union has an obligation to pursue all legitimate grievances of faculty members whether or not they belong to the union, but the union does not have to take every unresolved grievance to arbitration. The union traditionally controls access to arbitration. The benefit of union control of access is that the cost of arbitration causes the union to be selective in the issues submitted to arbitration, and this often eliminates trivial grievances. This discretionary power occasionally places the union in conflict with individual faculty members.

In 1967 the Supreme Court, in *Vaca* v. *Sipes*, ruled that no individual employee has an absolute right to arbitration. This private sector principle of union control of access to arbitration has not been accepted universally in education labor relations. Great diversity still exists. Some faculty contracts leave the decision to seek arbitration solely to the grievant. Other contracts allow either the grievant or the union to request arbitration. Some states, through either legislation or court decree, have guaranteed individual access to arbitration.

Type of Arbitrator. Some institutions prefer a single arbitrator chosen on an ad hoc basis. Others prefer the judgment of a panel of three arbitrators. With a three-member panel, management and labor each selects an arbitrator, then these two arbitrators select a third. The arbitration decision is rendered by the three arbitrators. The expense of using three arbitrators has minimized this practice. In addition, there is a belief among many that the third arbitrator makes the decision and the other two are merely advocates for their respective constituencies.

Some schools and unions have become dissatisfied with the use of a new arbitrator for each grievance and have agreed to a permanent arbitrator who hears all grievances. Those who favor the selection of a permanent arbitrator believe that it is preferable to vest authority in someone who knows the campus, the bargaining history, and the respective parties, rather than an externally selected person who often is unfamiliar with the academic environment. Having a permanent arbitrator

also eliminates the time-consuming process of selecting a new arbitrator each time a grievance is ready for arbitration.

Several disadvantages have been associated with permanent arbitrators. Sometimes a particular issue would benefit from a hearing by someone with a different philosophy and background. In addition, the existence of a readily accessible permanent arbitrator tends to encourage more numerous requests for arbitration. Some also believe that a permanent arbitrator is less likely to reverse his awards even when the facts dictate that a reversal is in order.

Expense of Arbitration. The expense of arbitration generally is divided evenly between the two parties. Routine expenses include fees and per diem for the arbitrator and court reporter. Both parties generally pay their own attorney's fees and other associated expenses. Some contracts fail to specify how arbitration expenses will be funded, and this omission frequently causes misunderstandings. One Midwestern college contract required the grieving party to pay 100% of the arbitration expenses. This practice would appear to have a chilling effect on the filing of grievances, which would defeat the purpose for having a grievance procedure.

The grievance procedure can be a valuable aid in resolving personnel disputes. Ambiguous language causes misunderstandings and often causes the procedure to be of less value than either party intended. As the above discussion of the nine characteristics indicates, there is ample room for ambiguity and misunderstanding. Careful attention to the wording of the grievance procedure will eliminate many problems.

Potential Reforms

Grievance arbitration has made a substantial contribution to school and college labor relations, but it is an imperfect process. Grievance arbitration has not fulfilled the vision of its early advocates, who preferred arbitration to litigation or self-help. Some of the problems that detract from the credibility of the process are listed below.

1. Many schools and colleges fail to utilize properly the lower steps of the grievance procedure. Rather than attempting to solve problems, both the union and the governing board prefer to "pass the buck" to the arbitrator.

2. Both grievance and arbitration proceedings have become legalistic and require transcripts, long hearings, and post-hearing briefs, which greatly increase the cost and time involved. The maxim "Justice delayed is justice denied" is applicable to school-based grievances and causes much frustration for grieving faculty and the administrators involved in the dispute.

3. Unions often use grievances for political purposes. Faculty unions have generated a flood of grievances prior to contract talks to make their efforts visible and to gain support. This diminishes the integrity of the grievance process and makes it difficult for management to respond except in an adversarial and legalistic fashion.

4. Some governing boards refuse to attempt resolution at the lower levels because they know that the local union cannot afford to arbitrate many grievances. This is a cynical abuse of the grievance arbitration process and is harmful to school morale.

5. Too few arbitrators are selected. It commonly is stated that 20% of the arbitrators are selected for 80% of the cases. Both parties want experienced arbitrators and resist hiring someone without a "track

record." It is extremely difficult for new arbitrators to obtain experience. This problem not only prevents the development of a cadre of professional arbitrators that will meet the growing case load, but it is a major reason for the extended time required for arbitration.

6. Few arbitrators have experience with education law. Consequently, awards often are made that violate the non-delegable powers of governing boards. This causes further litigation and a greater expenditure of time and money.

7. Arbitration has become so widely used that often there are not enough arbitrators to fulfill the demand. The Federal Mediation and Conciliation Service (FMCS) and the American Arbitration Association (AAA) processed 24,000 arbitrations in 1982. The limited number of arbitrators for such a work load erodes the efficiency of the process.

These problems prevent arbitration from living up to the AAA motto, "Economy, Justice and Speed!" Several reforms have been suggested as a means of minimizing some of the problems.

Expedited Grievance Arbitration Procedures

Some industries have established expedited grievance procedures to minimize cost, time delays, and the frustrations of formal arbitration. Experience has proven that this can greatly streamline the arbitration process. Expedited procedures include one or more of the following features: 1) elimination of written transcripts and briefs; 2) elimination of written rulings; 3) use of non-lawyers as arbitrators; 4) elimination of the court reporter; and 5) request of arbitrators to make the award within a very short time, for example, 48 hours or 10 days.

While this is a promising reform, it has not been adopted widely in education. One study of Illinois community college faculty contracts failed to find a single contract with expedited grievance arbitration procedures. The key reason behind the rejection of expedited arbitration is probably that most people will not accept a shortened procedure that is final and binding when the issues are of significant personal importance.

Grievance Mediation

Grievance mediation also has been suggested as a viable reform. This

process allows the parties to request mediation after all steps of the internal grievance procedure have been used. The experienced mediator attempts to assist the parties in resolving the grievance. If mediation fails, the mediator provides an advisory opinion that states how the grievance is likely to be decided in formal arbitration. The mediation is a no-risk situation. The grievance may be resolved through the mediation process. The parties may accept, albeit sometimes reluctantly, the mediator's opinion; or they still may go to arbitration with a new arbitrator.

Those who practice grievance mediation attempt to keep the process informal and stress problem solving rather than legalistic procedures. The goal is to settle three grievances per day. This greatly decreases the cost. This reform also has found little acceptance in education.

It is desirable that educators experiment with these and other reforms of the grievance procedure. This should result in better procedures and a better working environment. Educators should take the lead in improving the grievance arbitration process. Our profession is unique, and we should seek improvements that minimize the friction that sometimes develops in our schools and colleges.

Conclusion

Grievance arbitration has become commonplace in U.S. schools and colleges. While a very useful tool for resolving disputes, it is an imperfect process that often obstructs justice and frustrates the individuals involved. Also, experience has proven that the failure to specify procedural details will lead to numerous problems.

Careful attention to process will eliminate many problems, but structural modifications may be necessary. Unfortunately, little experimentation with the structure of grievance procedures has occurred in education. It is hoped that more experience with bargaining will lead to experiments with alternatives to the traditional private sector grievance procedure.

But the key to successful dispute resolution is not details and procedures – it is the attitude of the parties. In far too many institutions, teachers, administrators, and board members have developed a distrust and dislike for each other, which is unhealthy for education. This dislike often intrudes into the grievance process in the form of intransigent management and politically motivated union leadership, who approach each grievance as a win-lose situation. Educators with these attitudes sometimes conduct themselves in such a way as to poison future relations between the parties, which is highly damaging to the smooth operation of the educational enterprise.

The late Harry Schulman recognized this problem and suggested that since the parties must continue to live with each other they should adopt a more enlightened, less legalistic, approach to grievance arbitration. He viewed the win-lose approach as totally inadequate. Schulman suggested

that it would be more appropriate for the parties to view each grievance arbitration as a mutual problem that potentially could affect their future relationship. He urged the parties to seek not merely a victory but a wise and enlightened award based on a fuil understanding of the problems.

When the parties want to work together, the grievance procedure can be used to maintain the integrity of the negotiated contract and disputes can be settled in a dignified and rational manner. This is the route to mutual respect and good labor relations. This happy state of affairs will not be achieved without effort on the part of both school management and faculty unions.

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